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No. 00-608

Supreme Court, U.S.
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In The
Supreme Court of the United States

STEVEN A. DIAMOND,
Petitioner,

v.

CITY OF TAFT,
a Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN D. GIBSON
Counsel of Record
EDWARD GORDON
GIBSON & GIBSON
P.O. Box 12006
BAKERSFIELD, CA 93389
(661) 664-7200
(661) 664-7268

Counsel for Respondent

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

14 pp

QUESTIONS PRESENTED

1. When Petitioner's proposed site for an adult bookstore in Taft, California, a rural town of approximately 6,800 people violates a local ordinance by being within 1000 feet of churches, parks, and residences, do the seven alternative sites available under the ordinance, three of which are available simultaneously, provide Petitioner with a reasonable alternative avenue of communication?

2. Is the "reasonable alternative avenue of communication" standard announced in *City of Renton v Playtime Theaters, Inc.* 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986) so unclear that this Court must clarify its opinion by explicitly setting rigid formulas for determining whether an adult business has a reasonable opportunity to open and operate?

3. Must this Court determine the optimum number of adult businesses for a city of a particular size, and announce static rules for examining the opportunities to open and operate afforded the first applicant as opposed to later applicants, or may the lower courts simply follow *City of Renton v Playtime Theaters, Inc.* 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986), and determine whether an adult business has a reasonable opportunity to open and operate?

4. May the lower courts exercise their discretion to determine whether an adult business is afforded a reasonable opportunity to open and operate in a particular case, or must this Court announce differing standards of reasonability depending on the particular circumstances of the city in question?

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Respondent City of Taft respectfully prays that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at *Diamond v City of Taft* 215 F3d 1052 (CA9 2000).

STATEMENT OF THE CASE

The petition before the Court is a continuation of petitioner Diamond's attempt to elevate a simple zoning ordinance into a federal case worthy of this Court's attention. This is yet another attempt to challenge the type of reasonable time, place, and manner restriction on adult businesses which this Court has found to be constitutional for decades. The flimsiness of the challenge is emphasized by Diamond's admission that the supposed "constitutional defect" he perceives is that the ordinance in question allows him to open and operate an adult business at any one of seven locations in Taft, "but not his own building" (Pet 4), which is within 1000 feet of churches, parks, and residences. Since the creation of the Circuit Courts of Appeal in 1891, this Court has used its discretionary power of review by certiorari sparingly, and only in cases involving serious and weighty matters, or to secure uniformity of opinion. *In re Wood* 143 US 202, 36 L Ed 125, 12 S Ct 417 (1892). The matters at issue in this case are neither serious and weighty, nor are they the subject of divergent opinions in the Circuit Courts. As such, the petition should be denied.

Diamond owns a building in the heart of downtown Taft, a rural town in Kern County, California which has a population of approximately 6,800 and a developed area covering approximately two square miles. The building is located on property zoned commercial, and for a number of years Diamond operated a pawnshop there which also carried

adult materials as less than twenty-five percent of its inventory.

The Taft adult zoning ordinance only allows adult materials to be sold in the commercial and manufacturing zones. The ordinance further requires that a business which has an inventory of more than twenty-five percent adult materials not be located within 1000 feet of any area zoned for residential use, any other adult entertainment business, any public or private school, park, playground, public building, church, commercial establishment operated by a bona fide religious organization, or any establishment likely to be used by minors.

Diamond wished to convert his pawnshop into a business which sold adult materials exclusively. Because the building which Diamond owned was within 1000 feet of churches, parks, and residences, Diamond did not qualify for a permit. Diamond was the first person to seek to open a business which sold adult materials exclusively. Before his request, no one had ever sought to operate such an adult business in Taft.

Diamond sued, and lost, in the federal district court, alleging that the Taft adult business ordinance was unconstitutional because it violated his First and Fourteenth Amendment rights. Diamond further alleged that Taft did not provide the reasonable alternative avenue of communication required by *City of Renton v Playtime Theaters, Inc.* 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986). The ordinance, however, was accommodating and allowed Diamond to open and operate an adult business at any one of seven sites. Three of these sites were simultaneously available.

The district court, having the benefit of evidence and expert testimony, held that all seven of the sites identified by Taft had adequate infrastructure consistent with the rest of the city, and that all seven were part of the relevant real estate market. The district court concluded that the three simultaneously available sites afforded Diamond a reasonable alternative avenue of communication and were thus adequate, holding that:

> "Given the limited demand both for adult businesses and adult business locations, the court is satisfied, based on all the evidence presented, that the allocation of three alternative sites in the present case does not impermissibly restrict alternative avenues of communication". *Diamond v City of Taft* 29 F Supp 2d 633, 645 (ED CA 1998).

Diamond appealed the judgment of the district court to the Ninth Circuit Court of Appeals, where he lost again. The Ninth Circuit affirmed the district court's ruling, but determined that the proper focus was not on the three sites simultaneously available, but on the seven sites available <u>in toto</u>:

> "We conclude that the proper measure of sufficiency is not the three sites that could exist simultaneously, but the total seven sites that are available under the ordinance." *Diamond v City of Taft* 215 F3d 1052, 1057 (CA9 2000).

The Ninth Circuit reached this conclusion by focusing on the crucial fact that Diamond was the first person to seek to operate an adult business in Taft, and as such had the

ability to select any of the seven potentially available sites, which was more than adequate:

> "Diamond is not limited by the 1000 foot restriction in choosing a site for his business. He can choose among all seven sites. Others who follow Diamond will be limited by the restriction, but he is not. Under these circumstances, we need only examine the total number of sites available". *Id.*, supra, 215 F3d at 1058.

Unsatisfied with this ruling, Diamond petitioned the Ninth Circuit for a rehearing, asserting that a ruling by another panel of the Ninth Circuit in *Young v City of Simi Valley* 216 F3d 807 (CA9 2000), which was decided a week before the *Diamond* decision, required an examination of the number of sites simultaneously available, as a matter of law, in every case. The Ninth Circuit panel which decided *Diamond* was unimpressed with this argument and denied the petition for rehearing. Diamond, continuing to flog a dead horse, then petitioned this Court for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Conflicting Decisions Do Not Require Review By Writ of Certiorari

In his petition, Diamond has attempted to manufacture a conflict by pointing to different results arrived at by two different panels of the Ninth Circuit. Such inter-circuit differences do not merit review by this Court. In the *Young v City of Simi Valley* 216 F3d 807 (CA9 2000) decision, filed

June 20, 2000, a panel of the Ninth Circuit held that the focus should be on the number of sites simultaneously available to an adult business. However, in the *Diamond v City of Taft* 215 F3d 1052 (CA9 2000) decision, filed June 27, 2000 and amended July 26, 2000, another panel of the Ninth Circuit held that the proper focus was on the total number of sites potentially available to the first adult business to seek to operate in a city. The two cases are distinguishable because Simi Valley is a larger city which is differently situated than Taft. Even if the two cases were factually identical, review by writ of certiorari would be improper because the Ninth Circuit has had no time to harmonize the rulings internally.

This Court has historically taken the position that conflicting decisions within a circuit are a problem to be resolved within the circuit. See *Wisniewski v United States* 353 US 901, 902, 1 L Ed 2d 658, 77 S Ct 633 (1957); *Davis v United States* 417 US 333, 340, 41 L Ed 2d 109, 94 S Ct 2298. Although it lacks the force of precedent, it is revealing that in one published article, Justice Harlan admonished practitioners that "decisions between different panels of the same court of appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the court of appeals itself". Harlan, *Manning the Dykes,* 13 Record of the NYC Bar Ass'n 541, 552 (1958). The petition for a writ of certiorari should therefore be denied, as any conflict can and should be resolved within the Ninth Circuit.

Furthermore, Diamond has failed to show any conflict between the Ninth Circuit and the Eleventh Circuit. The text cited from *David Vincent, Inc. v Broward County* 200 F3d 1325, 1334 (CA11 2000), in which the lower court stated that this Court "has not thoroughly explained what factors to consider" is mere dicta. The Eleventh Circuit reached its

decision independently of this statement, using those standards established by this Court. The absence of an actual conflict between circuits indicates that this Court should deny the petition.

2. The Petition Raises Only Questions of Evidence and Factual Findings

The heart of Diamond's claim is that he was not afforded a reasonable opportunity to open and operate an adult business in Taft. He objects to the finding by the district court that "the allocation of three alternative sites in the present case does not impermissibly restrict alternative avenues of communication". *Diamond v Taft* 29 F Supp.2d 633,645 (ED CA 1998). He also objects to the holding of the Ninth Circuit that the proper test is the total number of potential sites available and that "the potential availability of seven sites in a community the size of Taft is sufficient to allow Diamond an opportunity to open and operate". *Diamond v Taft* 215 F3d 1052, 1058 (CA9 2000). In either case, the issues Diamond purports to raise cannot be resolved without entangling this Court in a re-examination of the facts and evidence before the lower courts. Such issues are, by definition, fact bound and unsuitable for review by writ of certiorari.

With child-like faith in the powers of repetition, Diamond continues to insist to this Court that the sites identified by Taft as potential locations for an adult business lack proper infrastructure. (Pet I, Question 1; 14) However, the district court, which had the benefit of evidence and expert testimony, specifically found that each and every one of these sites "meet the infrastructure needs of a commercial establishment in Taft". *Diamond v Taft* 29 F Supp.2d 633,

637, 639 (ED CA 1998).

Finally, Taft must point out that much of Diamond's argument consists of unsupported posturing and statements of opinion. For example, Diamond claims that adult businesses are being "squeezed out" by cities with the tacit approval of the circuit courts (Pet 10-11) and appears to assert that the public prizes erotic speech more highly than political speech (Pet 14). Diamond also constructs a peculiar hypothetical analogy involving baseball teams, adult bookstores, and red light districts (Pet 15). Even if these arguments were properly before this Court, they are inextricably fact bound, and could not be considered without the benefit of evidence, experts, and testimony.

For these reasons, any consideration of the matters Diamond has identified in his petition would necessarily involve factual and evidentiary issues which are not properly addressed by a writ of certiorari.

3. The Court Below Fully and Correctly Decided the Issues

The "uncertainty" which Diamond perceives in existing law appears to flow from a refusal to accept the holding of *City of Renton v Playtime Theaters, Inc.* 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986). In *City of Renton* this Court resolved all of the issues raised by Diamond through a simple test: does the city's ordinance afford a particular adult bookstore a reasonable opportunity to open and operate? Unable to come to grips with the fact that two federal courts have followed the path laid out in *City of Renton* and concluded that Taft's ordinance afforded him a reasonable opportunity to open and operate his business, Diamond insists that this Court's past rulings have been

unclear and incomplete, leading to confusion in the lower courts. To the contrary, this Court has clearly announced the applicable standards, which the lower courts have properly followed in deciding this case.

In *Young v American Mini-Theaters, Inc.* 427 US 50, 72-73, 49 L Ed 2d 310, 99 S Ct 191 (1976) this Court upheld the right of cities to require separation between adult businesses. In *City of Renton v Playtime Theaters, Inc.* 475 U.S. 41, 54, 89 L Ed 2d 29, 106 S Ct 925 (1986) this Court set the standard to which cities seeking to regulate adult businesses would be held-- that those seeking to establish adult businesses be allowed a reasonable opportunity to open and operate. Diamond, it appears, will accept nothing less than a ruling that holds him above the law and allows him to operate an adult business in the building he owns, despite its proximity to churches, parks, and residences.

Federal district and appellate courts have found Diamond's reading of the law without merit. Instead, they have properly focused on exactly the issues identified by this Court, and concluded that in a city the size of Taft, a 1000 foot separation between adult businesses was not impermissibly restrictive. Seven potential spaces, three of which were simultaneously available, provided Diamond with a reasonable alternative avenue of communication. While the judicial "NO" Diamond has received may not be to his liking, mere disagreement with the judgements of lower courts does not warrant review by this Court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN D. GIBSON
Counsel Of Record

EDWARD GORDON
Of Counsel

GIBSON & GIBSON
P.O. Box 12006
Bakersfield, CA 93389
(661) 664-7200
(661) 664-7268 FAX

Counsel For Respondent